In the Supreme Court of the United States

October Term, 190

OCTOBER TERM 1909

W. T. WAGGONER, Plaintiff in Error,
vs.
T. H. FLACK, Defendant in Error

No. 458

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas

[illegible]

W. W. FLOOD,
Attorney for W. T. Waggoner

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

W. T. WAGGONER, *Plaintiff in Error,*
vs.
J. M. FLACK, *Defendant in Error.*

No. 405.

In Error to the Court of Civil appeals, for the Second Supreme Judicial District of Texas.

BRIEF FOR W. T. WAGGONER, PIAINTIFF IN ERROR.

This was a suit originally instituted in the District Court of Wilbarger County, Texas, to recover of the defendant in error 640 acres of land and known as Section No. 60, Block No. 4, H. & T. C. R. R. Co.'s Surveys.

It is a school section set apart by the State for common school purposes, but is sold to individuals, under regulations prescribed by law at stipulated

prices, requiring a part of the principal in cash, and annual payments of interest on the remainder.

In the case at bar, this section was sold to D. B. Phillips in November, 1885, at $2.00 per acre, on thirty years time, and interest at five per cent on deferred payments, and one-thirtieth of the principal was paid in cash. And the annual installments of interest was regularly paid up to the 1st day of January, 1893. The plaintiff in error, W. T. Waggoner, acquired title to this section of land by regular conveyances from D. B. Phillips, and these were filed with the Commissioner of the General Land Office, and all of these preliminary matters was in accordance with the law, and no question is made thereon. (Rec. 5.).

The legislature has at its sessions since 1879, been constantly making changes in this law, and especially in regard to the periods when the annual installments of interest shall be paid: in the first instance requiring this payment to be made on the 1st of March, and this time has been variously extended, until now it is fixed on the 1st day of November in each year.

Not only this, but the method of enforcing the performance of these contracts has undergone various changes. At the special Session of the Sixteenth Legislature, 1879 (Acts 1879, p. 26, sec. 12), it was provided that failure to pay this interest the 1st day of March following the maturity of any payment, proceeding should be had by suit, and judgment be had against the purchaser, if he failed to show that the interest had been paid. But latterly, from 1883

down to the present, it has been generally provided that in case of failure to pay interest when due, the custodian of the obligation of the purchaser shall endorse thereon, *lands forfeited*, and there shall be no necessity for judicial ascertainment of the facts of forfeiture (Acts 1883, p. 88, sec. 10).

And one of the contentions in this case in *all of the Courts below*, and the only contention in this Court grows out of the act of the Legislature of Texas of 1885, approved February 23rd, and under which act the original purchaser, D. B. Phillips, bought, and which especially provided that failure to make the annual payments of interest on these obligations prior to the 1st day of August after the same becomes due shall not cause *a forfeiture of the rights of such holder in such land.* It was insisted, both in the District Court of Wilbarger County, and in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and on application for Writ of Error to the Supreme Court of Texas, that any subsequent act of Legislature, as the act of 1887, or 1897, which undertook to authorize a summary forfeiture of the rights to this land of Phillips, or his Vendee, the Plaintiff in Error here, as was sought to be done by the Commissioner of the General Land Office on the 20th of August, 1897, was and did impair the obligation of his contract made in pursuance of this act of the 23rd February, 1885, and that all subsequent laws, authorizing such summary forfeitures, was in conflict with Art. 1 Sec. 10, Constitution of the U. S. And we are now before this Court to press and further urge this contention.

FIRST.

To the acts of 1883, Regular Session of the 18th Legislature, on this subject, pp. 85, 86, 87, 88, entitled an "Act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the common school funds, etc.," and especially the following Sections, viz:

Section 9. The purchaser shall at once pay to the person selling for the State, or to the State Treasurer, as the Board may determine, and within such time as it may fix, one thirtieth of the amount bid, and execute his obligation for the remainder of the purchase money, payable to the State of Texas, and binding the purchaser to pay one thirtieth of the whole price on the first day of each succeeding year until the whole is paid, and interest at the rate of five per cent per annum on the whole unpaid purchase money from date, payable annually on or before the first of March of each year; and provided, that after the expiration of seven years, the purchaser shall have the option to pay the unpaid principal, and providing that a failure to pay the annual installments of principal shall not work a forfeiture until the whole sum is due, etc.

Section 10. If upon the first day of March of any year, the interest due remains unpaid, the custodian of the obligation of the purchaser shall endorse on it "lands forfeited," and the account kept with the purchaser, shall show such failure to pay and such forfeiture; the failure to pay the interest shall *ipso facto* work a forfeiture, and the entry on the account shall be evidence of the fact, and there shall

be no necessity for judicial ascertainment of the facts of the forfeiture, etc."

So stood the law until 1885, when Sections 9 and 10 were amended, and it is only necessary here to notice the amendment of Section 10, which is pertinent to our inquiry and is as follows:

"Section 10. If upon the first day of August of any year, the interest due on the first day of the previous March remains unpaid, the custodian of the obligation of the purchaser shall endorse on it "lands forfeited," and the account kept with the purchaser shall show such failure to pay and such forfeiture: the failure to pay the interest by the first day of August following its maturity shall *ipso facto* work a forfeiture and the entry on his account shall be evidence of the fact, and there shall be no necessity for judicial ascertainment of the facts of the forfeiture, etc." Acts of 1883, pp. 13 and 14, approved February 16th, 1885. And this brings us down

SECOND

To that Act of the Legislature, modifying the act of 1883, and under which the purchase in this case was made, which is as follows:

"An act to prevent the forfeiture of the rights of purchasers of Public Free School, University or Asylum land."

"Section 1. Be it enacted by the Legislature of the State of Texas: That the failure of a holder of Public Free School, University or Asylum land under contract of purchase from the State, to make the

annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land.

Section 2. The near approach of the close of the Session, and the importance of this Bill to many citizens of this State create an imperative necessity and emergency authorizing the suspension of the constitutional rule requiring Bills to be read on three several days, and demanding this act take effect from and after its passage, and it is so enacted. Passed February 19th, 1885. Approved February 23rd, 1885." (Acts of 1885, page 18.)

The application to purchase this section was made by D. B. Phillipps on the 30th of October, 1885, and the same was duly awarded to him in November, 1885, and the Plaintiff in Error is the owner of this interest by conveyances duly executed. (Rec. 5.)

THIRD.

In 1887, the Twentieth Legislature changed very largely the manner of placing these lands on the market, and making sales thereof, but we only desire to call the Courts attention to a part of Section 11, of this act which is as follows:

"Section 11. If upon the first day of August of any year, the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation "land forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon

said land shall be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law, etc ," and it was further provided in this act by

"Section 26. All laws and parts of laws in conflict with this act are hereby repealed, etc." (Acts 1887, Regular Session, pages 87 and 91.)

FOURTH.

But in 1897, the 25th Legislature passed the following act, and under which the forfeiture in this case was had, entitled: "An act to authorize the Commissioner of the General Land Office, to forfeit all lands heretofore sold by the State under any of the various acts of the Legislature, for failure to pay any portion of the interest thereon.

Section 1. Be it enacted by the Legislature of the State of Texas:

That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas, for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the Public Schools, University, or any of the other various State institutions, has not been paid, it shall be the duty of the Commissioner of the General Land Office to endorse on the obligation for said lands, "lands forfeited," and shall cause an entry to that effect to be made on the account kept with such pur-

chaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be re-sold under the provisions of the existing law, or any future law: Provided, the purchaser of said land shall have the right at any time within six months after such endorsement of "lands forfeited," to institute a suit in the District Court of Travis County, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive; provided, that if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death."

This act is cumalative, and is not intended to deny to the State the right to institute any legal proceedings that may be deemed necessary to secure the purchase money or possession of the lands so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the Legislature, under which land may have been sold by the State.

Section 2. The fact that the authority of the Land Commissioner to make forfeitures of land without judicial ascertainment has been questioned, and the fact that there are now more than ten thousand

purchases, which can be forfeited under the law, for non-payment of the interest due thereon, and the further fact that it is almost impossible to institute so many different suits against so many different purchasers, creates an imperative public necessity requiring the suspension of the rule providing that bills be read on three several days, and the same is hereby suspended.

Approved March 25th, 1897. Takes effect 90 days after adjournment."

Acts 1897. Regular Session, p. 39.

The 24th Legislature, at its regular session in 1895, also took a hand at innovation in regard to the sale of these school lands, but Section 2 of this act, which pertains to the forfeiture of these lands for non-payment of interest, and the only part thereof bearing on the matter here, is identical with the Section on the subject, in the act of 1897 above shown, and for that reason is not set out here. But it repealed all laws in conflict with it.

Acts 1895, Regular Session. Sec. 11, p. 67.

I.

Having set out the law under which the purchase in this case was made, and which we contend became a part of the contract of purchase, and the Statutes also, which we insist would impair the obligation of this contract, but especially that of 1897, under which the forfeiture in this case was had.

We come now to present the Error we conceive to have been committed by the Court of Civil Ap-

peals on the hearing of this cause, and which this Court can review, as follows:

"In not concluding and holding as a matter of law that the forfeiture of the contract of purchase of D. B. Phillips of the land in controversy, made by the Commissioner of the General Land Office in August, 1897, was void, in that the Statute under which he acted contravenes Section 10, Article 1, Constitution of the United States, which inhibits any State from passing any law impairing the obligation of a contract, because this land was purchased by Phillips from the State of Texas, under a law made by the State in 1885, which especially prohibited forfeitures of such sales for non-payment of interest and all legislation subsequent thereto, such as the acts of 1895 and 1897 authorizing such forfeitures for non-payment of interest, would and did impair the obligation of his contract, made under this act of 1885. And hence the act of the Legislature of Texas under which the Commissioner acted in this particular was unconstitutional and void." (Rec. 27.)

There was judgment in the District Court of Wilbarger County against the Plaintiff in Error. (Rec. 3.)

It was insisted in that Court, that the Statute authorizing the Commissioner, to make this summary forfeiture, was unconstitutional and void, because it impaired the obligation of Phillips' contract with the State, and was inhibited by the Constitution of the United States. (Rec. 4.)

On Appeal, to the Court of Civil Appeals, for the Second Supreme Judicial District of Texas, this

was one of the grounds. assigned as Error, committed by the District Court of Wilbarger County. (Rec. 8.)

But the judgment of the Court of Civil Appeals was adverse to the Plaintiff in Error, on this as well as other contentions. (Rec. 14 and 15.)

It will be observed from the Record that several phases of this case, were certified by the Court of Appeals to the Supreme Court of this State for answers, but are not material here, further than to show, that the Supreme Court held that this forfeiture could have been had, under the act of 1897, and that this act did not have the effect of repealing Sec. 11, of the law of 1895, which authorized identically the same proceeding. (Rec. 11, 12.)

However, notwithstanding this expression of opinion, from our Supreme Court, the Plaintiff in Error, after making a motion for re-hearing in the Court of Appeals, (and again insisting on the invalidity of the Statute, authorizing the forfeiture, but the motion being deaied;) (Rec. 15, 16,) proceeded to make his application to the Supreme Court for writ of Error, to the Court of Civil Appeals, to review its judgment, on various grounds, but especially, was it challenged, for being "*constrained*" by the opinion of the Supreme Court in the case of Fristoe vs. Blum 45 S. W. R. "to overrule the main contention" of Plaintiff in Error in this case (Rec. 14) as to the validity of this Statute, authorizing this summary forfeiture in this particular cause. (Rec. 17, 22.) But this writ was promptly refused. (Rec. 23.) Thus making this judgment of the Court of Civil Appeals, in this behalf the last resort and final.

Hence we come to consider the foregoing assignment of Error, as set out herein.

There is no controversy here, as to the provisions of law when this contract of Phillips was entered into. The Record shows it was made under the law of 1883, as *modified* by the act of February 23rd, 1885. (Rec. 5.)

The essential element of the contract under these several Statutes, is the payment of the interest, on the contract price of these lands, but the last named act vouchsafed to all purchasers under it, that any failure on their parts to pay the annual installments of principal or interest thereon prior to the first day of August after the same becomes due (to which act it had been extended by the act of February 16th, 1885) *should not cause a forfeiture of the rights* of such holder in such land.

There can be no question that a valuable right was hereby conceded to purchasers under this law.

They were promised this and it was made one of the terms of this contract, that they would not be deprived of this valuable right hereby conceded, in event of failure to pay interest at the times stipulated in the contract.

This was the law in existence when this contract was made, not only that, but it was the very law that fixed the terms of this particular contract and made it.

It is not by mere fiction then that it became part of this contract, but entered into it and was as matter of fact part of it.

This act and the one it modified constituted the law, which in its nature formed and became the con-

tract, and when rights have vested under such contract, subsequent legislation cannot divest them. (Fletcher vs. Peck, 6 Cranch, 87.) These laws were in effect a proposition on the part of the State, and having been accepted in this case by Phillips became a binding contract, and one of the terms thereof was, his *right* to hold this land, *should not be forfeited* if he failed to pay the interest at the time specified therein. But the act of 1897 changed the terms of this contract, in that it sought to give the Commissioner of the General Land Office, authority to *forfeit his right* in this land, in the event the interest was not paid, at the time named in this act. Here then was a change sought to be made in the express terms of this contract, it made new conditions, not contemplated when this contract was entered into, it fixed other terms than those agreed on, and the extent of change is immaterial; any deviation from the terms of the contract impairs its obligation, and is obnoxious to the Constitution. (Green vs. Biddle, 8 Wheat 1.) Nor is this rule in any sense changed by this act of 1897, extending the period of the payment of this interest, until the first day of November (Acts 1897, p. 39) and beyond the period allowed in the first instance, and make it applicable to a contract executed before its passage. (Bronson v. Kinzie, 1 How. 311; Howard v. Bugbee, 24 How. 461.)

Nor is it any answer to this proposition to insist that this act of 1897 was a law pertaining to the remedy, for this Court has said in no equivocal terms: "If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the

obligation of the contract in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial, or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." (McCracken v. Hayward, 2 Howard 608.)

II.

We will examine now the decisions of our State Courts on some of the various statutes on this subject:

The Supreme Court on Writ of Error to the Court of Civil Appeals, Third District, in construing a purchase under the act of 1883, and the acts of February 16th and February 23rd, 1885, held: "The three acts referred to contain all of the Legislation that is applicable to the subject now in controversy."

It will be seen at the date of the passage of the last act there was no law in force providing for the forfeiture of a purchase, except the provisions in the amendatory act of the 16th February, 1885, which declared the failure to pay the interest by the 1st day of August the sole ground for declaring such forfeiture.

The next act plainly declares that such failure to pay interest shall not cause a forfeiture.

It seems to us that the Legislative intention to repeal the only law authorizing the declaration of a forfeiture for the non-payment of interest is manifest from the language used in the act.

If one look to its caption it still more conclus-

ively appears that the purpose was to "prevent" the forfeiture of the rights of purchasers, not to change or limit the facts from which such authority could result.

"If the annual installments of interest shall not be paid as they mature, the State may, and its proper officers should, bring suit for their collection and enforce the State's vendor's lien. Under such a proceeding the interest can be collected as it matures, and the purchasers' rights may be divested as effectually, if not as summarily, as they could have been by a non-judicial forfeiture." Berrendo Stock Co. v. McCarty, 85 Texas, 412.

This act was again drawn in question by Court of Civil Appeals, Second District, on the proposition: that it violated Art. 7, Sec. 4, of the State Constitution, which forbids the Legislature to "grant any relief to purchasers of School land, and it was held: It does not release the purchaser from any part of his obligation, but "simply waived a harsh and summary remedy", and that the Commissioner of the Land Office, at the time he attempted to forfeit the purchaser's rights to the land in question, there was no law in existence authorizing him to do so. Capps et al., v. Garvey, 41 S. W. R., 379.

And further, it was held: by the Court of Civil Appeals, Fourth District, "A provision in a contract to purchase School lands from the State, that the contract shall be forfeited on failure of purchaser to pay interest on the purchase money, is not enforceable, unless such provision is authorized by law." Patterson v. O'Docherty, 23 S. W. R. 293.

But the Supreme Court has lately reviewed at much length, a forfeiture made under the act of 1887, in a case, where the purchase was made under the act of 1883. This case was before it on error, to the Court of Appeals, Third District. This act of 1887, again revived the "forfeiture" provision, such as was contained in the Act of 1883. And it held: "That Section 11 of this act, authorizing the Commissioner of the General Land Office to declare school lands purchased from the State forfeited, when the interest remains unpaid on August 1st of any year, empowers the Commissioner to rescind sales, where the purchaser fails to comply with the terms of the purchase whether the sale was made before or after the enactment of the law, and that this merely provides a new remedy and is not unconstitutional." In discussing the case, it further said, as to the contention that this was unconstitutional. "A sufficient answer so far as this case is concerned, to that proposition, would be that this contract was entered into when such a law existed, and provided for doing the very thing that the Commissioner has done, and the repeal of the law could not constitute on the part of the State an obligation, that it should not be restored in the future; we prefer, however, to put this decision upon the broader ground and stronger position that, when a right exists, the Legislature may give a new remedy, provided it does not deprive either party of a substantial right."

It furthered declared, that the term "forfeiture" was inaptly used in the statute, that it was nothing more than a recission of the contract, and the asser-

tion of the paramount Title on the failure to comply with the contract; that neither this right, nor remedy by recission was given by the Statute of 1887, both existed at common law."

It further took occasion, to say, it would not approve the decision in the case of Berrendo Stock Co. vs. McCarty, Supra, in so far as it pertained to the annunciation, that there was no law in existence between the 1st of August 1887 and the 15th day of November in the same year by which purchases could be declared forfeited, that the only question before the Court, presented by the Record and discussed by the Court, was the former act of Feby. 23rd, 1885, &c. Fristoe vs. Blum 45 S. W. R. 998. Also in 92 Texas 76.

So it can be readily perceived, why the Court of Appeals, having jurisdiction of this case, held: They were "constrained by the opinion of our Supreme Court in Fristoe vs. Blum (Supra) to overrule the main contention of Appellant in this case" (Rec. 14.)

Nor is this all, for very lately, Judge Fly of the Fourth District of Appeals, on an Appeal to that Court, involving a purchase of School land, under the act of 1879, which provided suit should be brought, in event of failure to pay interest &c., whilst yielding, earnestly protests against some of the theories of the Supreme Court, in these cases, and says: "The change made in the law of 1879, by the act of 1897, is not one merely of a change of procedure in the Courts, but it is a wresting from the purchaser of land, the right to be heard in the

Courts at all. This right if not guaranteed to him by the Constitution was given to him by the law which formed a part of his contract. To summarise, we do not think the State or any individual has any Authority in law to declare a contract for the sale of land forfeited, or rescinded regardless of the equities possessed by the Vendee, and if it ever had such Authority, it contracted it away in the law under which the land in this case was bought. Sims vs. Wright 56 S. W. R. 110.

These decisions are cited purely to show the contrarity of opinion in our own Courts, on this subject, and if the majority ruled, or if the Courts of Appeal were not bound by the decisions in our Supreme Court, our contention in this cause would have prevailed in the Court of Appeals for the Second District.

But on this question it is beyond doubt, that the Courts of the United States will not accept as binding, the opinions of the State Courts. Citizens Saving Bank v. Owensboro, 173 W. S. 636. Douglas v. Kentucky, 168 W. S. 488.

III.

This same provision of forfeiture in the act of 1887 was contained in the act of 1897, and under which the forfeiture in the case at bar, was had. This word "forfeiture" is used in all of the acts of the Legislature on this subject down to 1897, and on the "obligation of the purchaser" the Commissioner is directed, when interest is not paid as required, to endorse "land forfeited"; and this is to be the evidence of the fact, and do dispense with

judicial ascertainment thereof. So far as the legal effect of this act of the officer is concerned, it may amount to recission: in either sense it would deprive purchaser of his right in the land.

This having then been stated clearly in all of this legislation, there can be no doubt, in the most unequivocal manner, it was distinctly asserted in the act of February 23rd, 1885, that thereafter he should not be "*deprived* of that right." It is inconceivable, that this act can be read and understood in any other sense, than an *obligation* on the part of the State, to *guarantee a right* to these purchasers, and of which they shall not be deprived. And this was a modification of the act of 1883, which strictly comprised all the terms of the contract, and if as a matter of fact it did not, being the law in existence at the time the contract was made, it entered into it and became part of it. But the Court in the case of Fristoe v. Blum seeks to escape this dilemma by putting it on the common law right to rescind, which it claims existed independent of the Statute.

But this is the State acting, and that very case concedes the State has no greater right in such case than an individual. But we ask this Court how the State could exercise that right, without some Statute designating the officer or person, to perform this function." From this we see no escape. Under this very decision, both of these rights, which it is claimed existed at common law, could not have been exercised but for this Statute of 1887, and it is too clear for argument to contend that this legislation was intended to carry into effect the theory therein announced, or

that it can be perverted to other purposes than that which is evident.

But even conceding this proposition, in the case of Capps v. Garvey, supra, this summary method of "forfeiture" or recission was held to have been waived by the act of February 23rd, 1885, and this case is still in full force. If the right has been waived, the act cannot be exercised summarily without impairing the right.

But it is a doctrine as old as this State, unless time is of the essence of the contract, no summary recission can be had, and the mere fact that land was the subject matter of this contract, is not sufficient to show time was of the essence of the contract; it must be by express agreement, or implied from the circumstances surrounding the case, or the nature of the property show such was the intention of the parties. Edwards v. Atkinson, 14 Texas 373-4.

And when time is not of the essence of the contract, mere delay in payment will not annul the contract nor authorize its recission. Hild v. Lime, 45 Texas 476.

Not only this, if time were of the essence of the contract, if the vendor has received part of the purchase money and gives indulgence after default, the only way to put an end to the waiver is by demand of payment and notice of intention to rescind. Scarbrough v. Arrant, 25 Texas 130.

All of these cases proceed upon the common law theory of paramount title and rescission, and we beg to refer to them to show that the Court in the case

referred to has not followed or applied in full force the very doctrine it espouses.

But it seems to us that our Supreme Court in considering this question, has separated the law pertaining to the remedy, and distinguished it from the "obligation of the contract," as though the remedy in existence when the contract is made, is not a part of it.

But it is well settled in this court, that the means of enforcing the contract, in existence when it is made, are so far a part of it, that it cannot be changed to the detriment of the rights of either party to the contract. (Barnitz vs. Beverly, 163 U. S., 122.

The legislature in our case did prescribe a new remedy, in the acts of 1897, p. 184, and the commission acted under it on the 20th August, 1897, and "forfeited" our rights to the land in controversy. (Rec. 5.)

This was a different remedy from the one in existence in 1885, when our contract was made, and materially impaired the rights *guaranteed* to us thereunder, and it is of this act about which we complain, and contend it is void as impairing the obligation of the contract entered into.

But this brief is already longer than anticipated and will close it.

We confidently submit this cause, remaining firm in the faith, that this act of 1897, which authorized the commission to declare the contract in the case "forfeited" is unconstitutional and void,

and will so be pronounced by this Court, and to that end we ask that this cause be reversed, and all of which is—

Respectfully submitted,

W. W. FLOOD,

Attorney for W. T. Waggoner.

No. 28.

Brief of Flood for T. C.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.
} No. 28.

In Error to the Court of Civil Appeals, for the Second Supreme Judicial District of Texas.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

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ARGUMENT FOR THE PLAINTIFF IN ERROR.

At the October Term, 1902, of this Court, the Plaintiff in Error filed his brief in this cause, and for reasons unknown to him, no appearance has been made by the defendant in error: but as the Court has directed that notice of the pendency of this cause be given the Attorney General of Texas, with leave to

file briefs herein for the defendant in error, and in pursuance thereof the Attorney General has filed briefs herein, in which it is contended that the decisions of this Court at its last Term in the case of Wilson vs. Standefer, in error to the Court of Civil Appeals, for the Third Supreme Judicial District of Texas, is virtually decisive of this cause, and thereby giving to it a trend not originally anticipated—it is deemed best to restate the contention of the plaintiff in error by way of printed argument, as well as to reply to the contention of the Attorney General, and therewith submit authorities deemed to support the propositions contended for, and supposed to have been unnecessary in the first instance. When the case was originally briefed, it was thought a cursory review of the most of the acts of the Legislature of Texas, relating to the sale of her school lands might be of assistance to the Court, in the investigation of the subject of this controversy; but we are inclined now to believe it tended rather to confuse on account of the many changes made, rather than throw additional light on the subject, or aid in its interpretation.

So we shall now confine ourselves solely to the act under which the purchase was made, and that under which the forfeiture was had.

The record shows that this purchase was made under the act of 1883, as modified by the act of February 23rd, 1885.

It is also shown all interest was paid up to January 1st, 1893, and tender made of all back interest. (Record 5.)

The acts of the Legislature of 1883, and of those of 1885, modifying the foregoing are shown at length on pages 4 and 5 of the brief of plaintiff in error, and will not be set out again.

It will be observed that while Section 9 of the Act of 1883, provided for the payment of one-thirtieth of the principal on the first of each succeeding year, yet there was a provision in the same section that failure to pay the annual installments of principal shall not work a forfeiture until the whole sum is due. So we will not allude further to that phase of the statute, and confine ourselves solely to the question of interest, as out of the failure to pay this interest, amounting to $61.87 annually for the four years from '93 to '97, springs the whole controversy. For whilst this was originally due on the 1st of March, it was by the tenth section of the Act of February 16th, 1885, postponed to 1st day of August. (Brief, pp. 4 and 5.)

But Section 10 of this act had the stereotyped provision to be found in all of the acts on this subject since 1887, providing if the interest remains unpaid after the first day of March of any year, the obligation of the purchaser shall be indorsed, "Lands forfeited," and it shall ipso facto work a forfeiture and there shall be no necessity for judicial ascertainment of the facts of the forfeiture.

Thus the law stood until the 23rd of February, 1885, when the Legislature passed a bill entitled: "An Act to prevent the forfeiture of the rights of the purchasers of Public Free School, University or Asylum Land."

Section 1.—"Be it enacted by the Legislature of the State of Texas, that the failure of a holder of Public Free School, University or Asylum Land under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land." (See the act at length on pages 5 and 6 of brief.)

Now D. B. Phillips had bid on this land $2.00 per acre and same had been awarded him in November, 1885, at that price on thirty years' time, and he paid one-thirtieth of the principal in cash, (Record 5) and a free translation of the remainder of the contract between himself and the State, was the payment of five per cent. interest on the remaining unpaid purchase price, amounting to $61.87 annually, on or before the 1st of August each year, with the distinct understanding, in the event he should fail to make this interest payment, it should not work a forfeiture of his rights in this land.

It is true this annual interest was paid until January 1st, 1893, but none thereafter, though an offer to do so was made. (Record 5.) The status of this matter was in no manner attempted to be changed until August 20th, 1897, when the record shows the land was forfeited for non-payment of interest by the Commissioner of the General Land Office of the State of Texas, without any judicial procedure or suit in Court, on the day aforesaid, and thereafter was again placed on the market and sold to J. M. Flack, the defendant in error, for $1.00 per acre. (Record 5.)

This action on the part of the Land Commissioner was induced by an act of the Legislature passed in March, 1897, taking effect ninety days thereafter, entitled: "An Act to authorize the Commissioner of the General Land Office to forfeit all lands heretofore sold by the STATE under any of the various acts of the Legislature, for failure to pay any portion of the interest thereon", and set out on pages 7 and 8 of brief of the plaintiff in error, filed herein.

This then presents sharply the contention of the plaintiff in error, that this Act of March, 1897, impaired the obligation of the contract entered into between D. B. Phillips, the vendor of plaintiff in error, and the State of Texas, as expressed in the Act of 1883, as modified by the Act of February 23d, 1885.

While a State engaged in governmental functions is to be regarded as a sovereign, yet when it becomes a party to a contract with a citizen the same law applies to it, as under like conditions would apply to an individual.

This rule is fully recognized by the Supreme Court of Texas in the construction of a statute on the same subject as the one now under discussion, and was so announced in the case of Fristoe vs. Blum, (92 Texas, 77) and in support thereof cited Davis vs. Gray, (16 Wall., 203) and Railway vs. United States, (14 Otto., 680) decided by this Court, and the former originating in this State.

Again the Court of Civil Appeals for the Second Supreme Judicial District in construing the Act of 1887, relating to the sale of the school lands, and which in all essentials is similar to the act under dis-

cussion, varying only in detail; but the manner of carrying the act into effect is vested in the Commissioner of the General Land Office, rather than in a board designated for that purpose, as was done in the Act of 1883,—distinctly held, this was a proposition on the part of the State to the class of persons specified in the statute, and the SALE is between the law and the proposed purchaser, and, in effect, the Commissioner has no discretion in the matter, but is bound to accept the application to purchase made in compliance with the law. (Metzler vs. Johnson, 20 S. W. R., 1116.) This case is followed in Hitson vs. Glasscock, (21 S. W. R., 710) and in other subsequent cases, and is the accepted doctrine in this State, and thus clearly making it a contract between the purchaser and the State, and the law itself constituting the contract between the State and the purchaser.

The Supreme Court of the State in construing the act of 1879, in reference to the same subject matter, held that Sections 6, 7, 8, 9 and 10 of that act embraced all the terms of the contract between the State and the purchaser, (Standefer vs. Wilson, 93 Texas, 232) and this is the very case affirmed by this Court at its last Term on writ of error from the Third Judicial District of Texas.

The only controversy in that case grew out of the twelfth section of that act, which provided, in case of default in payment of interest on the contract, the proper officer shall institute proceedings to forfeit the purchase, and judgment of forfeiture shall be entered. But this section of this act was held not to be a part of the contract, though it was conceded if

it had been a term of the contract it should be treated as prescribing the exclusive method of forfeiture. The same Court had already held, persons may contract for a remedy lawful in itself, but not given by law, for the enforcement of a right. (Loan Association vs. Hardy, 86 Texas, 610.) That case grew out of a contract lien with power of sale, wherein it was provided a particular mode should be followed in case of sale. Subsequently the Legislature provided a different method and it was declared to be repugnant to the Constitution, as impairing the obligation of the contract, and in support of that decision the Court cited the case of Bellmeyer vs. Evans, (40 Pa. St., 327) in the following language:

"But a statute strictly remedial may impair the obligation of a contract; and when this happens the act is unconstitutional. (Bronson vs. Kinzie, 1st How., 322.) This always happens when the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves, and the legislature must let them alone * * * If the thing provided for by the legislature be within their general competence, and yet, be the very thing expressly excluded by a particular contract it is plain as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract."

So these decisions from the Supreme Court of Texas, on this question of forfeiture, provided for in the

acts discussed, as a method of rescission of the contract of sale of its Public School Lands in effect held, in the one case that this provision was not a part of the CONTRACT, and for that reason, no complaint could be urged against it, and besides the statute did not give the right, it already existed and might be subsequently authorized by the law-making power, and in the other case, that the same provision occurred in the act, creating the contract, and the subsequent enactment of the same provision could not constitute an obligation on the part of the State, that it should not be restored in future, but it was distinctly announced, and the opinion was put on the "broader ground and stronger position that when a right exists the legislature may give a new remedy, provided it does not deprive either party of a substantial right."

We beg now to restate the case at bar, and the acts under which it was made, for these constituted the contract, and the contrast between it and the acts which elicited the opinions just alluded to, occurs to us, will make it plain that these decisions in no manner affect our case adversely, but that one of them and the latest adjudication on the subject virtually holds, the contention we make in this case is correct, and the act of 1897, when applied to it would be unconstitutional, as impairing the obligation of the contract.

The record shows that Phillips, the purchaser of the section in controversy, was awarded the same in November, 1885, on his application, at $2.00 per acre, thirty years time, one-thirtieth cash and five per cent.

interest on the remainder, payable on the first of each succeeding March, which was subsequently extended to the first day of August, and the record also shows it was subsequently forfeited for non-payment of interest on the 20th of August, 1897, without any judicial procedure or suit in Court. (Record 5.)

The statute required (Section 9, Acts of 1883,) the purchaser shall pay one-thirtieth of the principal, and five per cent. interest on the remainder, on the first day of each succeeding March. (All other part of payment on principal being postponed until the whole sum is due.) But this act also provided for summary forfeiture, in case of failure to pay interest on first day of March of any year, when the same remains unpaid. (Sections 9 and 10, Acts 1883, set out in brief.)

So the law stood until February 16th, 1885, when Sections 9 and 10 of the acts of 1883 were amended, but in no essential particular, so far as the question in hand is concerned, but a few days thereafter, on viz: February 23rd, 1885, the following act was passed: "An Act to prevent the forfeiture of the rights of purchasers of Public Free School, University or Asylum Land."

Section 1. Be it enacted by the Legislature of the State of Texas: That the failure of a holder of Public Free School, University or Asylum Land under contract of purchase from the State, to make annual payments of principal or interest thereon prior to the first day of August after the same becomes due SHALL NOT CAUSE a forfeiture of the rights of such holder in such land."

This is all the law, and all the contract. There has been no question made, nor can there be, that the foregoing act was not a part of the contract between the State and Phillips. On the agreed statement, on which this cause was tried, it was distinctly stated: "We, the attorneys for the plaintiff and defendant, agree that the facts in this case are:

That D. B. Phillips, under the act of 1883, as modified by the act of February 23rd, 1885, on 30th of October, 1885, made application in compliance with the ruling of the State Land Board of Texas to purchase the land in controversy, etc."

These acts, as has already been shown, under our own decisions, comprise all the terms of the contract, between the purchaser and the State, and being so, it seems to us, there can be no escape from the conclusion, that this act of the 23rd of February, 1885, is as much a stipulation in the contract, as is the obligation to pay five per cent interest on all of the unpaid purchase price.

This being true, it would seem superfluous to add that the Act of 1897, which authorized summary forfeiture on all lands theretofore sold by the State, for any unpaid interest, and the action of the Commissioner of the General Land Office, in proceeding under that Statute to forfeit the land in controversy, not only impaired the obligation of the contract between Phillips and the State, but deprived him of a valuable right, conceded under the law constituting his contract.

Then the deductions in Fristoe vs. Blum, 92 Texas, 77, in no manner conflict with the contentions

in this case, for there the Court was construing a contract made under the Act of 1883, before its modification on the 23rd of February, 1885, and simply held, no complaint could be made on ground of a summary forfeiture made under a subsequent law, as the contract in hand was made under a law, providing for the same method.

Nor does the conclusion reached by the Court, in Standifer vs. Wilson, 93 Texas, 232, conflict in any wise with what is claimed, in the cause at bar, because, in that case, it was held that Section 12 in the Act of 1879, providing in case of default in payment of interest, the proper officer should proceed to institute suit, to declare the forfeiture, was not a part of the contract, and hence no rights of complainant were abridged by subsequent act authorizing summary forfeiture.

But we beg to invite the Court's especial attention to a portion of the opinion in the case supra., as follows:

"The Statute of 1879 does not give authority to any officer to rescind without judicial action, but the right of recission existed in the State, and its exercise might be subsequently authorized through the law-making power; and an exercise of it, based upon the default of the other party, would not be a denial of any right of his.

IT COULD ONLY BE HELD THAT THE RIGHT OF RESCISSION, FOR DEFAULT OF THE PURCHASER, DID NOT EXIST, BY HOLDING THAT THE CONTRACT HAD PROVIDED THAT IT SHOULD NOT EXIST, or that it should be exercised in a particular manner, but the contract embraces no such

provision." Standifer vs. Wilson, 93 Texas, on page 238.

The contract in the case before the Court unequivocally provided, "that failure to pay interest shall not cause a forfeiture of the rights of such holder in such land," and comes fully in the terms of such a contract as Judge Williams, in the case supra., says would NOT authorize a rescission of the contract, for rescission is nothing more nor less than that which is denominated "forfeiture" in all of the statutes on this subject. This being conceded by the Supreme Court of Texas, it would seem useless to elaborate the subject further, and to do so could serve no good purpose.

Not only that, but this case, in the above particular, pointedly refutes the contention of the Attorney General of Texas, in the brief filed in this cause by him, that the decision in that cause, which was affirmed by this Court, concludes the case at bar, for we think it not only does not do that, but is a bow of promise, in the judicial firmament, to those standing in the stead of the purchaser of the land in controversy, that their rights in this respect are inviolable.

Again, we beg leave to differ with the Attorney General in his conclusion, because it was held, Section 12 of the Act of 1879, in construing a purchase of land under that Act, was not a part of the contract, and that Section 10 of the Act of 1883 (the forfeiture provision), being eliminated by the Act of 1885, that therefore the last Act is not a part of the contract of a purchase under its provision. This seems to us not merely illogical, but it begs the question. Because

the Court held, Section 12 contained none of the provisions of the contract, nor expressed any of the rights or obligations arising thereunder, but was simply a general law of the State, for enforcing rights in the Courts, it does not follow that the Act of 1885 is similar to the foregoing, and subject to the same construction, and, as a matter of fact, could not possibly be subject to the same construction, since it in no manner undertook to prescribe a method for enforcing rights in the Courts, but distinctly provided for the very converse of such a course, in that it positively waived and relinquished to the purchasers under this law, the authority it had under the common law, to forfeit the rights the holders of these lands had acquired in their contracts of purchase, either through or without the intervention of the Courts. This decision went one step further: It held the parties might contract for a special remedy, and when they did, it must be respected. That being true, the converse of the rule must hold good, and the State can obligate itself, as it undertook to do and did do, not to resort to this summary measure, but to relinquish it in the interest of its purchasers, as was done by the Act of 1885. A sufficient reason for this course is shown in the emergency clause of this bill, declaring its importance to many citizens of the State, made it imperative to suspend the constitutional rule and make it effective after its passage. (Sec. 2.) And in this, the State could suffer no injury. The vendor's lien remained intact, and her suit to foreclose this lien remained open all the time, and it will be noticed the Act of 1897, providing for this forfeiture,

declared the Act to be cumulative and not intended to deny to the State any legal proceeding that may be deemed necessary to secure the purchase money or the possession of the land sold.

We fail to see any method of escape from the conclusion, that the provisions of this Act of 1885 were as much a part of the obligation on the part of the State, in the sale of this land, as was the provision to convey the title, when the purchaser has complied with the terms of payment, as shown in the contract. And we respectfully submit this cause should be reversed.

W. W. FLOOD,
Attorney for W. T. Waggoner.

No. 149. 28
Brf. of Def. for State of Texas
Filed Mar. 24, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 149.

W. T. WAGGONER, PLAINTIFF IN ERROR,

vs.

J. M. FLACK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF C. K. BELL, ATTORNEY GENERAL OF THE STATE OF TEXAS.

C. K. BELL,
Attorney General,
T. S. REESE,
Assistant Attorney General,
Counsel for the State of Texas.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 149.

W. T. WAGGONER, Plaintiff in Error,

vs.

J. M. FLACK, Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief of C. K. Bell, Attorney General of the State of Texas.

In this cause the defendant in error, J. M. Flack, does not appear in this court by brief of counsel or otherwise.

On February 4, 1902, the following order was made herein:

"Notice of the pendency of this cause directed to be given to the Attorney General of Texas, and leave is given to file briefs for defendant in error within twenty days. Counsel for plaintiff in error is required to file printed copies of statutes referred to."

And afterwards this court was kind enough to extend the time for filing brief by the Attorney General of Texas to thirty days.

The question involved in this case is one of very great public importance in the State of Texas, inasmuch as a decision of this question in favor of plaintiff in error would necessarily result in the setting aside of all forfeitures of public lands falling under the same conditions as presented herein and the cancellation of all sales made of such lands after declaration of forfeiture by the Commissioner of the General Land Office.

For this reason, the State of Texas avails herself of the opportunity so kindly presented by this court in the order herein quoted

and submits, briefly, in support of the judgment rendered in this cause in the State courts the following:

It is submitted *in limine* that the sole question to be decided has been decided by this court at the present term in the case of T. K. Wilson vs. J. F. Standifer, No. 105, opinion rendered March 3, 1902. In the opinion in that cause this court quotes with approval from the opinion of the Supreme Court of Texas, and concludes as follows:

"Upon the whole, we agree with the conclusion of the Supreme Court of Texas, that no contract rights of a purchaser under the Act of 1879 were impaired by the provisions of the subsequent Act of 1897; that the twelfth section of the Act of 1879 was not, in legal contemplation, a stipulation by the State that the only remedy which might be resorted to by the State was the one therein provided for; that, in the language of Chief Justice Marshall, 'the distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct.'"

I shall endeavor here simply to show that the case at bar falls clearly within the principle here decided.

As in the case of Wilson vs. Standifer, the forfeiture here complained of as being violative of the Constitution of the United States, was had by the Commissioner of the General Land Office under the provisions of the Act of 1897, which provided for "office forfeitures," as distinguished from "judicial forfeitures" of lands sold, in case of failure to pay interest.

This act is, as shown in the brief for W. T. Waggoner, plaintiff in error, on page 7, "That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas, for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, University, or any of the other various State institutions, has not been paid, it shall be the duty of the Commissioner of the General Land Office to endorse on the obligation for said lands 'Lands Forfeited,' and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and

shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right at any time within six months after such endorsement of 'Land Forfeited' to institute a suit in the district court of Travis county, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive; provided, that if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death," and is referred to in the opinion of this court in Wilson vs. Standifer, page 4 (paragraph 12 of statement of facts quoted in the opinion).

In each case there was a forfeiture of the land by the Commissioner of the General Land Office without judicial ascertainment and afterwards a sale to the defendants in error, respectively.

In the case of Wilson vs. Standifer the sale afterwards canceled for failure to pay interest was made under the Act of July 8, 1879.

This statute does not give to any officer of the State the right to declare a forfeiture of sales made thereunder for failure to pay interest, but, on the contrary, the act, in Section 12, expressly provided for a suit in the district court by the county or district attorney on the part of the State, in case of such failure. It was contended by plaintiff in error in Wilson vs. Standifer that this provision as to judicial forfeiture was part of the contract of sale under that act, which could not be abrogated by a subsequent act providing for a declaration of forfeiture by the Commissioner of the General Land Office without judicial action. This contention was overruled by this court.

In the case at bar the sale was made under the Act of 1883, Section 10 of which expressly provided for a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment, for non-payment of interest, by March 1, 1883.

By an amendment of this section in 1885, August 1st was fixed as the date of payment instead of March 1st, as in the original act. Previous to the sale of the section of land involved in this suit, however, the Act of February 23, 1885, was passed. This act is set

out in brief of plaintiff in error (pp. 5 and 6). The first section of this act is as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the failnre of a holder of public free school, University or asylum land under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land."

So the question is, is this provision a part of the obligation of the contract between the State and a purchaser of public land, entered into while this act was in force, to such an extent as to preclude the Legislature from afterwards providing for a forfeiture or rescission of such sales by the State through the proper officer without judicial ascertainment?

While this question was not directly passed upon by the Supreme Court of Texas in Fristo vs. Blum, 92 Texas, 76, as the sale in that case was made under the Act of 1883, prior to the passage of the Act of 1885 above recited, the opinion in that case is broad enough, and certainly was expressly intended to be broad enough, to embrace sales made under that act after the passage of the Act of 1885.

The following expression from the opinion of the Supreme Court of Texas in Fristo vs. Blum, *supra*, is here quoted (pp. 83-84):

"But it is said that a construction of section 11, which would give to the Commissioner of the General Land Office the authority to enter a forfeiture as in this case would render the act unconstitutional, because it would be giving to it a retroactive effect by which it would violate the obligation of the contract. A sufficient answer, so far as this case is concerned, to that proposition would be that this contract was entered into when such a law existed and provided for the doing of the very thing that the Commissioner has done, and the repeal of that law could not constitute on the part of the State an obligation that it should not be restored in the future. We prefer, however, to put this decision upon the broad ground and stronger position that where a right exists the Legislature may give a new remedy, provided it does not deprive either party of a substantial right. Sutherland vs. De Leon, 1 Texas, 305; Johnson vs. Taylor, 60 Texas, 362."

This will suffice to show the difference and the only difference between the case of Wilson vs. Standifer and the case at bar.

The Act of 1883 provided for forfeiture by the Commissioner of the General Land Office without the action of the courts. The Act of 1885 provided that the failure to make annual payment of principal and interest prior to August 1st after the same becomes due shall not cause a forfeiture of the rights of such purchaser.

Under the Act of 1883 the only remedy provided by which the State could rescind the contract and recover the land was the remedy of a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment. There is no express reservation of the cumulative remedy of judicial proceedings for that purpose, as in the Act of 1897, so that the most that can be said for the contention of plaintiff in error is, that after the passage of the Act of 1885, no remedy was provided *by statute* for rescission or forfeiture by the State in case of failure to pay interest on lands sold while the Act of 1885 was in force. In other words, the Act of 1885 repealed section 10 of the Act of 1883. This did not bind the State, as an obligation of its contract of sale, not to provide a remedy by future legislation with regard to such sales. (Fristo vs. Blum, 92 Texas, 84; Sturgis vs. Crowinshield, 4 Wheaton, 122.)

The only difference, then, between the case at bar and Wilson vs. Standifer is, that in the former the sale was made under a statute which did not provide any remedy for failure to pay interest, while in the latter the sale was made under a statute which did provide a particular remedy, *i. e.*, by judicial proceeding for a rescission of the contract and the recovery of the land.

If, as declared in Wilson vs. Standifer, the Legislature might, without violating the obligation of the contract of sale, drastically change the remedy expressly provided in the statute under which the sale is made, it is respectfully submitted that there can be no sound reason for holding that it could not, by subsequent legislation, provide a remedy where none is given in the statute under which the sale is made.

If the remedy expressly given by section 12 of the Act of 1879 was not a part of the contract, as held in the above case, then surely the elimination by the Act of 1885 of the statutory remedy given by section 10 of the Act of 1883, can not be said to be a part of the contract of sale under that act.

The repeal by the Act of 1885 of the provisions of section 10 of the Act of 1883, left unimpaired the common-law right of rescission

(Fristo vs. Blum, *supra*), taking away only the statutory remedy of forfeiture. The case is as if no remedy at all had been provided in that act. There was left the obligation of the purchaser to pay according to the terms of his contract, and the common-law remedy of the State for a rescission of the contract of sale for failure on his part to do so. After the sale in this case, the Legslature changed the common-law remedy, or rather adds to it the specific remedy of rescission by the act of the Commissioner of the General Land Office.

It is submitted that the case is clearly within the doctrine announced in Wilson vs. Standifer by this court and in Fristo vs. Blum, by the Supreme Court of Texas.

It is not too much to say that hundreds of titles of settlers on public lands in Texas will be overthrown if the contention of the plaintiff in error is sustained by this court. These titles rest upon a construction of the statute law of the State by the Supreme Court. We quote from the opinion of this court in Wilson vs. Standifer:

"But as the general rule is that the interpretation put on a State constitution or laws by the supreme court of that State is binding upon this court, and as our right to review and revise decisions of the State courts in cases where the question is an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of the court, even in such a case, to follow the decision of the State court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating the exercise of the taxing power, or relating to the State's disposition of its public lands."

It is respectfully submitted that the judgment of the Court of Civil Appeals of Texas should be affirmed.

C. K. Bell,
Attorney General,
T. S. Reese,
Assistant Attorney General,
Counsel for the State of Texas.